84-1479 (1)

No.

IN THE

Supreme Court of the United States

October Term 1984

HON. ROBERT J. HENDERSON, Superintendent,
Auburn Correctional Facility,

Petitioner,

against

JOSEPH ALLAN WILSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Whether, in the absence of an intervening change in the law or any other compelling factor, principles of finality of habeas corpus litigation preclude a federal court from reconsidering an issue that has been fully adjudicated by the federal district and appellate courts pursuant to a previous petition for a writ of habeas corpus.

2. Whether repetitious federal review of an issue raised in a successive petition by which a person in state custody challenges a final state judgment necessarily fails to serve the "ends of justice" where, pursuant to a previous petition for a writ of habeas corpus, the same issue received plenary consideration, was fully adjudicated by the federal district and appellate courts and was found by this Court not to warrant a writ of certiorari; where there has been no intervening change in the law; where the claimed constitutional error does not give rise to a substantial question as to the validity of the determination of guilt; and where no other compelling factors have been identified or established.

3. Whether a judgment of the Court of Appeals for the Second Circuit must be vacated where, without applying the presumption of correctness mandated by 28 U.S.C. § 2254 (d) and without complying with the requirement, announced by this Court in *Sumner* v. *Mata*, 449 U.S. 539 (1981), to explain in writing why one of the exceptions enumerated in § 2254(d) was deemed applicable, the Court of Appeals relied upon its own findings of fact, which are contrary to those of a state hearing court as well as to those of two fed-

eral district courts and a majority of a prior panel of the same Court of Appeals.

4. Whether the presumptively correct state court finding that Wilson's inculpatory jailhouse statement to an undisclosed government agent was spontaneous and not deliberately elicited—a finding supported by direct and uncontradicted hearing testimony regarding the circumstances surrounding the statement—negates the inference of deliberate eliciting that, under *United States* v. *Henry*, 447 U.S. 264 (1980), might be drawn in the absence of such direct evidence.

5. Whether, if *United States* v. *Henry*, 447 U.S. 264 (1980), represented a change in the law sufficient to warrant the Second Circuit's reversal of its own prior judgment, it should be deemed a new rule of law and should not be applied retroactively in a habeas corpus proceeding.

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No.

IN THE

Supreme Court of the United States

October Term, 1984

HON. ROBERT J. HENDERSON,
Superintendent: Auburn Correctional Facility,

Petitioner,

against

JOSEPH ALLAN WILSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on August 27, 1984.

Opinions Below

The opinion of the Court of Appeals, *Wilson* v. *Henderson,* —— F.2d ——, is appended hereto as Appendix A. That Court's order, entered December 17, 1984, denying a petition for rehearing and suggestion for rehearing en banc is not yet reported and appears as Appendix B. The

unreported decision of the District Court for the Southern District of New York may be found in Appendix C.

Prior to the present proceeding, the District Court for the Southern District of New York and the Court of Appeals for the Second Circuit considered and rejected respondent's original petition for a writ of habeas corpus which raised, *inter alia*, precisely the same factual and legal issue that was raised in the present proceeding. The relevant portions of the earlier unreported decision of the District Court and of the prior opinion of the Court of Appeals, which is reported at 584 F.2d 1185, as well as that Court's denial of a petition for rehearing and suggestion for rehearing en banc, which is reported at 590 F.2d 408, are appended hereto as, respectively, Appendix D, Appendix E, and Appendix F. This Court's denial of a petition for certiorari in the earlier proceeding is reported at 442 U.S. 945.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on August 27, 1984. A timely petition for rehearing and suggestion for rehearing en banc was denied on December 17, 1984, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> . . . nor shall any State deprive any person of life, liberty nor property without due process of law . . .

United States Code, Title 28, section 2254(d) provides that:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

United States Code, Title 28, section 2244(b) provides, in pertinent part:

> When . . . after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States releases from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person

> need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

Rule 9(b) of the Rules Governing United States Code, Title 28, section 2254 provides:

> Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Statement of the Case

I. Wilson's Admission to an Undisclosed Informant

In the early morning of July 4, 1970, Joseph Allan Wilson and two others committed a robbery at the Star Taxicab Garage, during which Sam Reiner, the dispatcher on duty, was shot and killed. Three employees observed Wilson, who had formerly worked at the garage, on the premises just before the murder and two of them saw him fleeing from the scene of the crime cradling money in his arms.

On July 7, 1970, Detective Walter Cullen told Benny Lee, an inmate of the Bronx House of Detention, that he expected to arrest Wilson soon, that he would place Wilson

in Lee's cell, and that he would like for Lee to listen to Wilson for the sole purpose of learning the identities of Wilson's two accomplices. Detective Cullen specifically instructed Lee that he was not to "question the man in any way". Without entering into any agreement with the police or receiving any promise regarding compensation for providing information, Lee indicated that he would perform the requested service.

Shortly thereafter, Wilson, having been arrested and arraigned, was moved to Lee's cell, which was in a cellblock from which the Star Taxicab Garage was visible. Upset by the view, Wilson began discussing his pending charges with Lee, and asserted, as he had in a previous statement to Detective Cullen, that he had observed two strangers commit the robbery and murder and that he had simply picked up some money that they dropped. Lee remarked that the story "didn't sound too good" and that "things didn't look good" for Wilson.

Several days later, Wilson was visited by his brother, also an employee of the Star garage, who conveyed to Wilson that their family was distraught over his role in the killing of Sam Reiner. Lee observed that "this upset him very much and that would start him to talking about different things, about the crime and different things". Shortly after that disturbing visit, Wilson admitted to Lee that he had planned the robbery with the other two men. that "[w]e shot the man," and that, afterwards, "[w]e picked up the money and left."

II. The State Court's Decision

Following a pre-trial evidentiary hearing, the state court denied Wilson's motion to suppress the statement. That ruling was based upon the court's factual determinations: (1) that Lee was instructed to ask no questions, but only to listen to what Wilson said; (2) that Lee followed those instructions; and (3) that the statements Wilson made to Lee were unsolicited and voluntarily made. After the trial, at which Wilson's statement to Lee was introduced, the Appellate Division, First Department, of the Supreme Court of the State of New York, unanimously, and without opinion, affirmed Wilson's conviction, *People* v. *Wilson,* 41 A.D. 2d 903, 343 N.Y.S.2d 563 (1974). The Court of Appeals of the State of New York denied Wilson's application for leave to appeal.

III. The First Petition for a Federal Writ of Habeas Corpus

In his original petition for a writ of habeas corpus, Wilson claimed that the admission at trial of his statements to Lee violated his constitutional rights. The District Court for the Southern District of New York, after citing *Massiah* v. *United States,* 377 U.S. 201 (1964), rejected this claim because "[t]he record indicates that there was no interrogation whatsoever by the undercover agent only spontaneous statements offered by petitioner." Appendix D, p. 32a). On his appeal from the District Court's order denying his petition for a writ of habeas corpus, Wilson, who was represented by counsel, again argued that the statements to Lee were deliberately elicited in violation of *Massiah.* The Court of Appeals for the Second Circuit, by a two-judge

majority, rejected that claim, holding that "there must be some circumstance more than the mere absence of counsel before a defendant's post-indictment statement is rendered inadmissible." *Wilson* v. *Henderson,* 584 F.2d 1185, 1190 (2d Cir. 1978) (Appendix E, p. 38a). The court distinguished Wilson's case from *Brewer* v. *Williams,* 430 U.S. 387 (1977), in which this Court found that a police officer deliberately elicited incriminating statements even though he did not interrogate the defendant, because "Lee did not interrogate Wilson, *nor in any way attempt to deliberately elicit incriminating remarks . . .*" [emphasis added]. 584 F.2d at 1191 (Appendix E, pp. 40a-41a).

A subsequent application for a rehearing en banc was denied, *Wilson* v. *Henderson,* 590 F.2d 408 (2d Cir. 1979) (Appendix F), and this Court denied a petition for certiorari. *Wilson* v. *Henderson,* 442 U.S. 945 (1979).

IV. The Second Petition for a Federal Writ of Habeas Corpus

A new round of litigation regarding the constitutionality of Wilson's statement to Lee was prompted by *United States* v. *Henry,* 447 U.S. 264 (1980), *aff'g.*, 590 F.2d 544 (4th Cir. 1978), in which this Court affirmed the Fourth Circuit's decision—which had been published prior to the denial of Wilson's suggestion for rehearing—holding that, under the circumstances of that case, a government agent's jailhouse conversation with the accused constituted "deliberate elicitation" in violation of the principles announced in *Massiah.*

After a New York State court found that *Henry* was factually distinguishable from Wilson's case and, therefore, that it did not support his motion for post-judgment relief, and after Wilson's applications for further state appellate review were denied, he filed a second petition for a writ of habeas corpus. As before, Wilson claimed that his statements to Lee were deliberately elicited in violation of the Sixth Amendment; the only new wrinkle was Wilson's assertion that *Henry* changed the constitutional standard for determining when a statement is "deliberately elicited" and rendered invalid the previous determination that the statement was obtained constitutionally.

In opposition, the state argued that *Henry* did not alter the constitutional principles and standards that were applied when Wilson's original petition was adjudicated and, therefore, that his successive petition on identical grounds should be dismissed; that the present case is factually distinguishable from *Henry*; and that, if *Henry* did promulgate a new constitutional rule, it should not be applied retroactively.

The District Court did not address the contention that Wilson's successive petition constituted an abuse of the writ, but proceeded to an independent examination of the record, from which it reported the following findings of fact:

> . . . [U]nlike the record in *Henry,* the record in the instant case does not support the inference that the government informant affirmatively secured the incriminating information from the accused. In fact, the instant record plainly establishes that petitioner's incriminating statements were spontaneous and were not elicited in any way by the government informant. The

testimony at the *Huntley* hearing established that petitioner's initial false exculpatory statements to Lee were a spontaneous response to petitioner's view of the Star Taxicab Garage from his cell window, and that petitioner's ultimate confession to Lee was a spontaneous response to a disturbing visit petitioner received from his brother. (Appendix C, pp. 27a-28a).

Based on those findings, the District Court rejected Wilson's claim and dismissed his petition.

On appeal, a two-judge majority of the Court of Appeals for the Second Circuit declared that, "notwithstanding that in his earlier petition Wilson advanced substantially the same ground for relief that he now advances, we conclude that the 'ends of justice' require a consideration of the merits of his present application" (Appendix A, p. 6a). Without any reference to the District Court's finding that the confession was a spontaneous response to the disturbing visit by Wilson's brother, the Second Circuit rejected the District Court's finding, and, implicitly, the underlying state court finding, that Wilson's statements were not deliberately elicited by Lee (Appendix A, pp. 9a-10a). Finally, the panel majority concluded that, although *Henry* worked so substantial a change in Sixth Amendment analysis that it warranted the invalidation of the prior decision of the Second Circuit, it did not establish a "new" constitutional rule for purposes of determining whether it should be applied retroactively [*cf. Stovall* v. *Denno,* 388 U.S. 243 (1967); *Linkletter* v. *Walker,* 381 U.S. 618 (1965)] (Appendix A, pp. 12a-16a). The majority thereupon reversed the District Court's order.

In dissent, Circuit Judge Van Graafeiland noted that the majority had, without explanation, relied upon factual

findings contrary to those of every court that had previously considered this case, including the state court's findings, which, under *Sumner* v. *Mata,* 449 U.S. 539 (1981), are entitled to a presumption of correctness (Appendix A, pp. 18a-19a). The dissenter concluded that "... my colleagues have failed to demonstrate that the many judges who previously have rejected [Wilson's] contentions erred in so doing, and have relied solely on a talismanic reference to the 'ends of justice' in getting around both the provisions of [United States Code, Title 28] section 2254(d) and the limitations on repetitive habeas corpus applications. ..." (Appendix A, pp. 19a-20a).

REASONS FOR GRANTING THE WRIT

POINT ONE

Review of the Second Circuit's judgment in this case will provide this Court an opportunity to clarify and define, as it never has before, the limits of a federal court's power to upset a state court judgment that has previously survived a federal habeas corpus challenge on identical constitutional grounds; in so doing, this Court may eliminate a source of pervasive and continuing tension between the federal government and the states.

In announcing its rejection of the factual conclusions underlying the District Court's ruling in the present case, the Second Circuit employed two words: "We disagree." (Appendix A, p. 9a). Absent from its terse statement was any explanation of why it concluded that the presumption of correctness [28 U.S.C. 2254(d)] should not apply to the state court's factual determinations, even though those

findings, based upon an uncontradicted record, had been accepted and confirmed by both of the district judges who had previously considered the merits of Wilson's Sixth Amendment claims as well as by the majority of the prior Second Circuit panel which had ruled that the statement in question was constitutionally obtained. The Court of Appeals achieved a similar economy of language when, having observed that *United States* v. *Henry,* 447 U.S. 264 (1980), the case upon which Wilson premised his second petition for a writ of habeas corpus, "merely applied settled precedent to a new factual situation," (Appendix A, p. 12a), it declared that, "notwithstanding that in his earlier petition Wilson advanced substantially the same ground for relief that he now advances, we conclude that the 'ends of justice' require a consideration of the merits of his present application" (Appendix A, p. 6a). This cursory remark was not accompanied by any indication of how repeated review of Wilson's claim would serve the "ends of justice." Thus, the savings in verbiage reflected in the Second Circuit's opinion were secured at great cost to the principles of deference to state court determinations and finality of judgments. Review of this case will enable this Court both to repair the harm done to those principles here and, more importantly, to provide much-needed guidance to the federal courts, and assurance to the states, regarding the limits on the federal courts' power to compel a state to relitigate a previously resolved issue on successive petitions for habeas corpus.

The Second Circuit's unquestionable failure to accord the state court findings the deference to which they are entitled under 28 U.S.C. § 2254(d) and its blatant disregard of this Court's explicit requirement of a written explanation

for a federal court's reliance upon contrary factual determinations, *Sumner* v. *Mata,* 449 U.S. 539 (1981), clearly warrant exercise of this court's supervisory powers. *See e.g. Marshall* v. *Lonberger,* 459 U.S. 422 (1983); *Sumner* v. *Mata,* 455 U.S. 591 (1982). Indeed, a grant of certiorari in a case such as this provides the only mechanism by which this Court can give weight and effect to its command that the federal courts accord a high measure of deference to state court findings. Moreover, although review of the Second Circuit's failure to apply the presumption of correctness alone would, concededly, break no new ground for this Court, the Court of Appeals' error in this respect was joined here by a larger disregard for the interests which 28 U.S.C. § 2254 was designed to advance: the interests in minimizing the friction between the state and federal courts and in insuring that there will at some point be an end to litigation. *See Sumner,* 449 U.S. at 550. The Second Circuit's determination, for no articulated reason, to reconsider a claim which it had previously rejected on the merits presents this Court with an opportunity to apply the concerns for finality and minimization of federal-state conflict that it has consistently recognized in its recent decisions to a significant subject that the Court has not addressed in over twenty years (and then only in *dicta*): the extent of a federal court's powers in ruling upon an issue raised in a successive petition for a writ of habeas corpus.

This Court last addressed the problem of successive habeas corpus petitions in *Sanders* v. *United States,* 373 U.S. 1 (1963). There, in *dicta,* the Court indicated that federal courts are armed with the discretionary power to deny a habeas corpus petition without reaching its merits

if the ground raised was previously considered on the merits, if it was resolved adversely to the applicant, and if "the ends of justice would not be served by reaching the merits of the subsequent application." 373 U.S. at 15. The Court further suggested that the applicant bears the burden of showing that, because he was denied a full and fair hearing on the prior application, or because of an intervening change in the law, or because of some other factor, the "ends of justice" would be served by reconsideration of the previously rejected ground.[1]

Although *Sanders* implies that a previously rejected ground for habeas corpus relief should not be reconsidered in the absence of some factor showing that review would serve the ends of justice, it stops short of mandating dismissal of a successive petition in the absence of any such factor. It must be noted in this regard that the actual holding of *Sanders* was limited to the ruling that *res judicata* does not bar a federal prisoner's second motion for resentencing pursuant to 28 U.S.C. § 2255. Thus, the *Sanders* court did not address the particular concerns that come into play when a federal court reviews the final judgment of a state court. Petitioner therefore suggests that the limited holding of *Sanders* should be re-evaluated, with an eye toward its expansion, in accordance with the principles of finality and deference to the role of the states in the federalist system that this Court has consistently recognized during the two decades since *Sanders* was decided.

1. The "abuse of the writ" principles discussed in *Sanders* are codified in 28 U.S.C. § 2244(b) and in rule 9(b) of the Rules Governing 28 U.S.C. § 2254.

Those principles were discussed at some length in *Engle* v. *Isaac,* 456 U.S. 107, 126-28 (1982):

> We have always recognized, however, that the Great Writ entails significant costs (footnote omitted). Collateral review of a conviction extends the ordeal of trial for both society and the accused. As Justice Harlan once observed, "[b]oth the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community." *Sanders* v. *United States,* 373 U.S. 1, 24-25 (1963) (dissenting opinion). See also *Hankerson* v. *North Carolina,* 432 U.S., at 247 (POWELL, J., concurring in judgment). By frustrating these interests, the writ undermines the usual principles of finality of litigation (footnote omitted).
>
> Liberal allowance of the writ, moreover, degrades the prominence of the trial itself. A criminal trial concentrates society's resources at one "time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence." *Wainwright* v. *Sykes,* [433 U.S. 72] at 90. Our Constitution and laws surround the trial with a multitude of protections for the accused. Rather than enhancing these safeguards, ready availability of habeas corpus may diminish their sanctity by suggesting to the trial participants that there may be no need to adhere to those safeguards during the trial itself.
>
> We must also acknowledge that writs of habeas corpus frequently cost society the right to punish admitted offenders. Passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible. While a habeas writ may, in theory,

entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution.

Finally, the Great Writ imposes special costs on our federal system. The states possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights. *See Schneckloth* v. *Bustamonte,* 412 U.S. 218, 263-265 (1973) (POWELL, J., concurring) (footnote omitted).

In *Barefoot* v. *Estelle* —— U.S. ——, ——, 103 S.Ct. 3383, 3391 (1983), the court observed that:

> "When the process of direct review—which, if a federal question is involved, includes the right to petition this Court for a writ of certiorari—comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited.

More recently, the Court has distinguished between habeas corpus litigants and those whose cases are pending on direct review, noting that:

> The one litgant has taken his case through the primary system. The other has not. For the latter, the curtain of finality has not drawn. Somewhere, the closing must come.

Shea v. *Louisiana,* —— U.S. ——, ——, 53 U.S.L.W. 4173, 4175 (Feb. 20, 1985). *See also Solem* v. *Stumes,* —— U.S. ——, ——, 104 S.Ct. 1338, 1345 (1984) ("At a minimum,

non-retroactivity means that a decision is not to be applied in collateral review of final convictions"); *Stone* v. *Powell,* 428 U.S. 465 (1976) (restricting substantive scope of habeas corpus jurisdiction in Fourth Amendment cases).

If, notwithstanding the interest in finality that this Court has so clearly articulated, *Sanders* may be viewed as permitting a federal court to reconsider a claim that has previously been litigated at every level of both the state and federal judicial systems even though there has been no intervening change in the law and no other factors have been cited in support of the claim that further review will serve the "ends of justice," then surely it is time for the guidelines announced in *Sanders* to be re-evaluated. Petitioner proposes that, consistently with the pronouncements cited above, this Court should declare, as a corollary to the suggestion in *Sanders* that a claim that has been decided adversely to a habeas corpus applicant on a prior application can be denied further federal review only if such review would not serve the ends of justice, that such a claim can receive further federal review only if such review would serve the ends of justice. Additionally, petitioner would suggest a requirement that a federal court's conclusion that the ends of justice would thus be served be supported by articulable objective factors relating to the particular case in question and that the court's "ends of justice" analysis include both an examination of the extent to which the alleged constitutional violation impugns the determination of guilt and a consideration of the hardships that further review would impose on the state. *See Walker* v. *Lockhart,* 726 F.2d 1238 (8th Cir.) (en banc), *cert. denied,* —— U.S. ——, 104 S.Ct. 2168 (1984) (Analysis of such considerations, in addition to the *Sanders* analysis, supported district court's refusal to reconsider previously rejected grounds

for habeas corpus relief because "[c]onsideration of the ends of justice involves not only the interest of the accused in justice but the interest of the public in justice").

Indeed, the Second Circuit itself, in a decision which conflicts directly with the approach it took in the present case, has advocated such an expansion of the *Sanders* doctrine. In *United States ex rel. Schnitzler,* 406 F.2d 319 (2d Cir.), *cert. denied,* 395 U.S. 926 (1969), the Court of Appeals reversed the order of a district judge who, without offering any justification, reached the merits of a petition that was identical to one that the Second Circuit had previously rejected. Recognizing that federal habeas corpus jurisdiction over state prisoners is "a branch of jurisprudence which is badly in need of some principles of finality," 406 F.2d at 322, the Second Circuit declared that "[n]ot only is it clear that under the *Sanders* standard the district court could have refused to entertain this second application for habeas corpus relief (citation omitted), but we hold that in light of the prior decision of this court the district court was *required* not to entertain this application" [emphasis added]. 406 F.2d at 321. Thus, review by this Court would resolve the conflict between the present case and the Second Circuit's own precedent.

The Seventh Circuit has also found support in *Sanders* for ruling that a district court abused its discretion by considering the merits of a successive petition despite the absence of a change in the factual or legal background of the previously rejected claim. *United States ex rel. Townsend* v. *Twomey,* 452 F.2d 350 (7th Cir.), *cert. denied,* 419 U.S. (1972). Similarly, the Eleventh Circuit has cited *Sanders* in support of its pronouncement that a successive habeas

corpus petition "should be entertained *only if* the ends of justice so require [emphasis added]." *Adams* v. *Wainwright,* 734 F.2d 51 (11th Cir. 1984). Thus, it is clear that the extension of the *Sanders* standard that petitioner proposes follows logically from the principles discussed in that opinion.

It remains for this Court, however, to fashion a rule of general application that, in addition to suggesting when a federal court may consider a successive application, as *Sanders* has done, will clearly denominate those circumstances in which it may not. Drawing such a line of demarcation will at once clarify the role of federal courts in adjudicating habeas corpus petitions and assuage the fear of the states that, even after running the gantlet of federal review, their judgments will still stand in perpetual jeopardy. Moreover, adopting such a rule would enable this Court to give effect to the principles espoused by Professor Bator in *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 Harv. L. Rev. 441 (1963), an article that has been cited frequently by members of this Court. [*See, e.g. Engle* v. *Isaac,* 456 U.S. 107, 127 n. 32 (1982); *Rose* v. *Mitchell,* 443 U.S. 545, 580 n. 1 (1979) (Powell, J. concurring); *Jackson* v. *Virginia,* 443 U.S. 307, 337 n. 12 (1979) (Stevens, J. concurring); *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 253-55 (1953) (Powell, J. concurring)]. There, it was suggested that:

> The presumption must be, it seems to me, that if a job can be well done once, it should not be done twice. If one set of institutions is as capable of performing the task at hand as another, we should not ask both to do it. The challenge really runs the other way: if a proceeding is held to determine the facts and law in a case,

> and the process used in that proceeding are fitted to the task in a manner not inferior to those which would be used in a second proceeding, so that one cannot demonstrate that relitigation would not merely consist of repitition and second-guessing, why should not the first proceeding "count"? Why should we duplicate effort? After all, it is the very purpose of the first go-around to decide the case. Neither it nor any subsequent go-around can assure ultimate truth. If, then, the previous determination is to be ignored, we must have some reasoned institutional justification why this should be so.

76 Harv. L. Rev. at 451. As the present case demonstrates, there is no existing rule of this Court precluding a federal court from unjustifiably permitting a second go-around to be followed by a third, notwithstanding the great cost thereby inflicted on society, the federalist system, and the principle of finality. Because of the pressing need to fill this critical void, this Court should grant certiorari to review the judgment below.

POINT TWO

Review of the decision below will enable this Court to clarify the import of its decision in *United States* v. *Henry*.

In *Massiah* v. *United States*, 377 U.S. 201 (1964), this Court held that a defendant was denied the protection of the Sixth Amendment when the government introduced against him at trial statements which had been "deliberately elicited" from him by government agents in the absence of counsel. Subsequently, in *United States* v. *Henry*, 447 U.S. 264 (1980), this Court discussed the *Massiah* prin-

ciple in the context of a defendant's statement to a cellmate who was acting as an undisclosed informant for the government. Largely because of the scantiness of the record in *Henry*, however, the opinion in that case, which was accompanied by a concurring opinion and two dissenting opinions, has prompted as many questions as it has answered regarding the circumstances under which the government's use of an informant impermissibly infringes upon a defendant's Sixth Amendment rights. The resulting confusion not only impairs the ability of courts to apply a consistent and straightforward standard in adjudicating claims arising in such a context, but, perhaps more significantly, also frustrates the efforts of law enforcement officers who recognize informants as a vital and valuable weapon in the battle to detect and anticipate crime and who seek to utilize such informants without transgressing constitutional restrictions. In this regard, it must be remembered that the *Massiah* Court did "not question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted." *Massiah*, 377 U.S. at 207.[2]

As Justice Brennan has observed with reference to the *Henry* decision, "[t]here has occasionally been disagreement as to the precise formulation of the relevant standard and its application to the sometimes-ambiguous facts in

2. The present case brings this comment directly to mind for here, in addition to instructing the informant to ask no questions, Detective Cullen indicated that he was specifically interested in learning the identities of Wilson's unapprehended accomplices. As the Second Circuit's first opinion in this case noted, "[t]he instructions to Lee suggest a conscious effort on Cullen's part to guard Wilson's constitutional rights, while pursuing a crucial homicide investigation." *Wilson* v. *Henderson*, 594 F.2d 1185, 1191 (2d Cir. 1978) (Appendix E, p. 42a).

cases before us." *Sweat* v. *Arkansas*, —— U.S. ——, —— 53 U.S.L.W. 3504, 3505 (January 14, 1985) (Brennan, J., dissenting). Indeed, the Ninth Circuit has complained that "[t]he extent to which *Henry* modified *Massiah*, if at all, is not entirely clear." *United States* v. *Bagley*, 641 F.2d 1235, 1238 n. 3 (9th Cir. 1981), *cert. denied*, 459 U.S. 942 (1982). Surely, the Second Circuit's decision in the present case, in which it found that *Henry* did not establish a "new" constitutional test, but, at the same time, that it invalidated the result that had been reached by a prior Second Circuit panel in reliance on *Massiah* (Appendix A, pp. 12a-16a), has done little to dispel the confusion. This Court should therefore grant a writ of certiorari in order to clarify the highly significant Sixth Amendment principles that were at issue in the judgment below.

The present case would enable this Court to provide such clarification because here, in contrast to *Henry*, the circumstances of the statement to the informant were fully developed at a pre-trial fact-finding hearing at which both the informant and the detective who instructed him testified and were subjected to cross-examination. In *Henry*, the only evidence elicited specifically in connection to a *Massiah* issue was an affidavit, filed years after the incriminating statement was made, containing the sketchy recollections of the instructing officer.[3] The inadequacy of the record in *Henry* was recognized by Justice Powell, who "view[ed] this as a close and difficult case because no evidentiary hearing has been held on the Massiah claim" *Henry*, 447

3. Henry did not challenge the constitutionality of his statement until 1975, nearly three years after it was made. Only after Henry's post-judgment motion pursuant to 28 U.S.C. § 2255 was denied, reversed on appeal, and then remanded did the District Court request affidavits. *Henry*, 447 U.S. at 268.

U.S. at 277 (Powell, J., concurring) and by Justice Blackmun, who noted that, because of the "scant record," "we know only that Nichols [the informant] and Henry had conversations . . . . We know nothing about the nature of these conversations." *Henry*, 447 U.S. at 287-88 (Blackmun, J., dissenting).

Because of the meager record to which it relates, *Henry's* holding is necessarily limited. Indeed, it can stand for little more than the proposition that, in the absence of evidence to the contrary, an inference of deliberate elicitation can be drawn from the existence of three factors: (1) that the cellmate was acting as a paid government informant; (2) that he was ostensibly no more than a fellow inmate; and (3) that the defendant was in custody and under indictment. *See Henry*, 447 U.S. at 271 ("This combination of circumstances supports the Court of Appeals' determination"). *Henry* thus leaves open the question whether such an inference is either negated or precluded by direct evidence that the defendant uttered the incriminating statements spontaneously or in response to impulses that were wholly independent of the government and its agents. That question is squarely presented by the present case, in which the pre-trial hearing testimony established that Wilson's inculpatory remarks were made after his own brother upset him by telling him of his family's anguish over Wilson's role in the murder of Sam Reiner, a family friend. Indeed, as District Judge Gagliardi recognized, the presumptively correct state court finding that Lee merely listened passively as Wilson unburdened his guilty conscience distinguishes this case from *Henry* and transports it into an area regarding which the *Henry* Court expressly reserved decision: "the situation where an informant is

placed in close proximity but makes no effort to stimulate conversations about the crime charged." *Henry*, 447 U.S. at 271 n. 9 (Appendix B, p. 28a).

Thus, by granting a writ of certiorari in this case, this Court will be able to address the situation that was explicitly not reached in *Henry* and to expound the weight and significance to be attributed to the circumstantial factors identified in *Henry*, when the bare bones reflected in those factors are fleshed out by direct evidence regarding the specific nature of the jailhouse conversations from which the defendant's incriminating statements emerged. In so doing, this Court may put an end to questions regarding the extent, if any, to which *Henry* modified *Massiah*. Concomitantly, this Court could resolve the question whether *Henry* established a "new" constitutional rule which should not be given retroactive effect in collateral proceedings. *Cf. Solem* v. *Stumes*, —— U.S. ——, 104 S.Ct. 1338 (1984) (Because *Edwards* v. *Arizona*, 451 U.S. 477 (1981), established a new constitutional rule, it should not be applied retroactively unless such application is warranted by the three criteria discussed in *Stovall* v. *Denno*, 388 U.S. 293 (1967)). Therefore, in view of the vital importance of the Sixth Amendment issues that would be elucidated by this Court's review, this Court should grant the petition for a writ of certiorari.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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March, 1985

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1054—August Term, 1983

(Argued April 5, 1984 Decided August 27, 1984)

Docket No. 83-2113

JOSEPH ALLAN WILSON,

Petitioner-Appellant,

—against—

HON. ROBERT J. HENDERSON,
Superintendent, Auburn Correctional Facility,

Respondent-Appellee.

Before:

TIMBERS, VAN GRAAFEILAND and CARDAMONE,
Circuit Judges.

Appeal from a denial of an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Reversed and remanded.

IDA C. WURCZINGER, New York, New York (Philip S. Weber, New York, New York, of counsel), for *Petitioner-Appellant*.

JEREMY GUTMAN, Assistant District Attorney, Bronx, New York (Mario Merola, District Attorney, Steven R. Kartagener, Assistant District Attorney, Bronx, New York, of counsel) for *Respondent-Appellee*.

CARDAMONE, *Circuit Judge*:

This appeal is from an order that denied habeas corpus relief. Reversing that order and granting petitioner his habeas remedy emphasizes not that a court likes or thinks it wise to reverse a conviction, but rather that a conviction obtained by means that offend constitutional principles may not stand. Here the State's use of a jailhouse informant placed in petitioner's cell by prearrangement to elicit inculpatory information violated his Sixth Amendment right to counsel.

Petitioner Joseph Allan Wilson appeals from a decision of the United States District Court for the Southern District of New York (Gagliardi, J.) that denied his application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Although appellant has been before us on a previous application, *Wilson v. Henderson*, 584 F.2d 1185 (2d Cir. 1978), *rehearing denied*, 590 F.2d 408 (2d Cir.), *cert. denied*, 442 U.S. 945 (1979), the circumstances of this case require some reiteration of the facts giving rise to his present application.

I

On July 4, 1970 three individuals committed an armed robbery of the Star Taxicab Garage during which the on duty dispatcher was shot and killed. Three employees identified Wilson as being present on the Star premises. Aware that the police were looking for him, Wilson voluntarily surrendered himself on July 8 and was promptly arrested. After receiving his *Miranda* warnings, he admitted to Detective Cullen that while looking for his brother on the day in question, he came upon the scene of the crime and witnessed the robbery. Wilson told the detective that he had not been personally involved and fled only because he was afraid of being blamed. Counsel was subsequently assigned him, and he was arraigned on July 9.

Sent to the Bronx House of Detention following his arraignment, Wilson was later moved to a cell that overlooked the Star garage. His cellmate, a prisoner named Benny Lee, had previously agreed to act as an informant. Detective Cullen had instructed Lee to listen "to see if [he] could find out" the identity of the other two perpetrators, but not to "question the man in any way." Immediately upon entering the cell Wilson expressed dismay over the view—"somebody's messing with me because this is the place I'm accused of robbing"—and began to talk to Lee about the robbery. He told Lee that he had seen the robbers commit the crime and picked up some of the money they dropped. Lee commented that Wilson had better come up with a more convincing story.

Wilson subsequently was visited by his brother and learned at that time how upset his family was over the killing. Wilson again became agitated and, when he next

spoke to Lee, changed his story. This time appellant admitted that he and his two cohorts had in fact executed the robbery according to plan over the holiday weekend when they knew there would be a lot of money in the garage, and that the victim was shot during the robbery. Lee later reported Wilson's inculpatory statement to Detective Cullen, and gave him pages of secret notations made during his conversations with Wilson.

Subsequently indicted and charged with murder and felonious possession of a weapon, appellant moved to suppress his statements to Lee. Following a *Huntley*[1] hearing, the state trial court found that Lee did not "interrogate" Wilson, but only listened and made notes. It therefore denied Wilson's motion, concluding that his statements were voluntary and unsolicited. At Wilson's state court trial, the proof of guilt was nearly overwhelming and appellant was convicted by a jury for both crimes. Appeals to New York's intermediate and highest court were unavailing.

After this journey through the New York state courts, Wilson filed a petition for a writ of habeas corpus in the United States District Court, claiming that the admission of Lee's statements violated his constitutional rights. Relying on *Massiah v. United States*, 377 U.S. 201 (1964), the district court rejected this claim, finding that the record did not show any formal interrogation by the undercover agent but only spontaneous statements by Wilson. As noted, we affirmed the district court and refused to grant a rehearing. Certiorari was denied in 1979.

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1 *People v. Huntley*, 15 N.Y.2d 72, 255 N.Y.S. 2d 838, 204 N.E.2d 179 (1965).

A year later the Supreme Court handed down its decision in *United States v. Henry*, 447 U.S. 264 (1980) (*Henry*). In September 1981 appellant filed a motion in state court to vacate his conviction, arguing that the admission of his statements to Lee was unconstitutional in light of *Henry*. In denying the motion the state court distinguished *Henry* on the ground that in that case Henry's cellmate was a paid government agent. The state judge also concluded that *Henry* was not to be applied retroactively. In January 1982 the Appellate Division denied Wilson's application for leave to appeal.

Having exhausted his state court remedies, Wilson filed a second petition for a writ of habeas corpus in the district court, specifically alleging that his right to counsel had been violated under *Henry* and that *Henry* should be applied retroactively. The district court, relying in part on the record of the state court hearing, concluded that Wilson had not been interrogated and that his statements to Lee were spontaneous. On appeal, Wilson argues that the district court erred both in concluding that there was no "deliberate elicitation" of incriminating statements within the meaning of *Massiah* and *Henry*, and in deferring to the state court's findings on this issue. Wilson also maintains that *Henry* formulated a constitutional rule governing an accused's right to counsel and urges us to apply *Henry* retroactively. The State contends that the legal principles articulated in *Henry* are no different from those we applied on Wilson's first habeas appeal, and that the ends of justice would not be served by reconsidering the merits of Wilson's petition, even were *Henry* not distinguishable.

II

It is well settled that courts may give controlling weight to a denial of a prior application for habeas corpus *only* if "(1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application." *Sanders v. United States*, 373 U.S. 1, 15 (1963); *United States ex rel. Schnitzler v. Follette*, 406 F.2d 319, 321 (2d Cir.), *cert. denied*, 395 U.S. 926 (1969).

The State urges that there must be an end to litigation on Wilson's claim. This argument will hardly halt the inexorable rising and falling of the legal tides. A look at the long and tortured history of *Henry* itself as it also slowly wended its way through the court system until its final resolution in the Supreme Court amply answers the State's argument. The doctrine of res judicata is generally inapplicable to habeas proceedings. *Smith v. Yeager*, 393 U.S. 122, 124-25 (1968) (per curiam); *Salinger v. Loisel*, 265 U.S. 224, 230 (1924). Moreover, we note that conventional notions of finality in criminal litigation are of no weight where life or liberty is at stake and infringement of constitutional rights is alleged. *Sanders v. United States*, *supra*, 373 U.S. at 8; *see Davis v. United States*, 417 U.S. 333, 342 (1974); *Kaufman v. United States*, 394 U.S. 217, 228 (1969). Thus, notwithstanding that in his earlier petition Wilson advanced substantially the same ground for relief that he now advances, we conclude that the "ends of justice" require a consideration of the merits of his present application.

III

We turn first to *United States v. Henry*, 447 U.S. 264. There the defendant was indicted in 1972 for armed robbery and held pending trial in a city jail. Government agents contacted Nichols, an inmate serving a sentence for forgery, who had previously served as a paid informant for the Federal Bureau of Investigation. Nichols advised the agents that he was housed in the same cellblock with several federal prisoners awaiting trial, including Henry. Nichols was told to be alert to any statements made by the prisoners, but not to initiate any conversation with or question Henry regarding the robbery. The informant later reported that he engaged in a conversation with Henry during which Henry told him about the robbery. Nichols was paid for this information. Henry's inculpatory statements were used against him at trial and led to his conviction, which was summarily affirmed, 483 F.2d 1401 (4th Cir. 1973), and his petition for certiorari was denied, 421 U.S. 915 (1975).

When Henry moved to vacate his conviction pursuant to 28 U.S.C. § 2255, he claimed that Nichols' testimony violated his Sixth Amendment right to counsel, inasmuch as a paid informant had been intentionally placed in his cell to secure information about the robbery. The district court summarily denied Henry's § 2255 motion, but the Court of Appeals for the Fourth Circuit reversed and remanded for an evidentiary hearing. The district court's second denial of the § 2255 motion was again reversed on appeal. The Fourth Circuit held that the government's actions impaired Henry's Sixth Amendment rights under *Massiah v. United States*, 377 U.S. 201 (1964). *Henry v. United States*, 590 F.2d 544 (4th Cir. 1978). After noting that Nichols had engaged in conversations with Henry,

the court of appeals concluded that if by association, general conversation, or both, Henry developed sufficient confidence in Nichols to bare his incriminating secrets, this constituted interference with his right to the assistance of counsel. 590 F.2d at 547.

On appeal the Supreme Court affirmed that decision. *United States v. Henry*, 447 U.S. 264. The issue was whether a government agent "deliberately elicited" incriminating statements from the defendant within the meaning of *Massiah*. *Id.* at 270. In considering that issue the Supreme Court viewed three factors as important: first, that Nichols was acting under instructions as a paid informant; second, that ostensibly he was no more than a fellow inmate of Henry; and third, that Henry was in custody and under indictment at the time he was engaged in conversation by Nichols. *Id.* The Court accepted the circuit court's determination that held Nichols' conduct attributable to the government, based in large part on the Government's awareness that Nichols had access to Henry and would be able to engage him in conversations without arousing his suspicions. In rejecting the government's argument that the agents had instructed Nichols not to question Henry about the robbery, the Supreme Court noted that Nichols was not a purely passive listener but had in fact engaged in some conversations with Henry which resulted in Henry's making the inculpatory statements. *Id.* at 271. In this connection the Court specifically stated that it was not passing upon a situation where an informant, although placed in close proximity to the accused, made no effort to stimulate conversations about the crime charged. *Id.* at 271 n.9. Thus, the high Court concluded that "[b]y intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government vio-

lated Henry's Sixth Amendment right to counsel." *Id.* at 274.

When comparing *Henry* to the present case, the district court recognized that Wilson's cellmate was surreptitiously acting as a government agent, but concluded that the record established that Wilson's statements were spontaneous and not elicited by Lee. Since the court thought that this case presented the precise fact pattern on which the *Henry* court had expressly reserved in footnote 9, the judge therefore found the instant case distinguishable. We disagree. A comparison of this case and *Henry* reveal three significant similarities: (1) as in *Henry*, here the informant Lee was surreptitiously acting as a government agent, while ostensibly no more than a fellow inmate of Wilson; (2) Wilson made the inculpatory statements after his Sixth Amendment rights had attached;[2] (3) in *Henry*, the government created a situation that in fact induced the defendant to make incriminating statements. The factors considered and given weight by the *Henry* Court are also present here. In both cases, the informant "had 'some conversations with' [the defendant] while he was in jail and [the defendant's] incriminatory statements were 'the product of [these] conversation[s].'" *Henry*, 447 U.S. at 271. This third factor deserves more detailed discussion.

Here, after Lee was summoned by Detective Cullen, he was shown a picture of Wilson. Lee asked whether he could do anything to help with the case. After agreeing to cooperate, Lee was told that Wilson was soon going to be

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2 It is of no moment that Henry had been indicted while Wilson had only been arraigned at the time he engaged in conversation with Lee since Wilson's Sixth Amendment right to counsel attached at the time adversary judicial proceedings were initiated against him. *See Estelle v. Smith*, 451 U.S. 454, 469-70 (1981); *Brewer v. Williams*, 430 U.S. 387, 398-99 (1977).

arrested and placed in Lee's cell. He was directed to find out as much information from Wilson as he could without asking questions. The fact that the government moved Wilson into a cell overlooking the Star Taxicab Garage—the scene of the crime—achieved the desired effect. As soon as Wilson arrived and viewed the garage, he became upset and stated that "someone's messing with me." The catalytic effect of being placed into this "room with a view" thus gave rise to expressed uneasiness on Wilson's part. Even accepting that Lee did not ask Wilson any direct questions, he effectively deflated Wilson's exculpatory version of his connection to the robbery scene by remarking that the story did not "sound too good" and that he had better come up with a better one. Subtly and slowly, but surely, Lee's ongoing verbal intercourse with Wilson served to exacerbate Wilson's already troubled state of mind. Lee testified that after several days and nights together, Wilson's version of the events surrounding the robbery changed "in bits and pieces." During this same time, Lee furtively made notes of his conversations with Wilson, which he later handed over to the police.

Thus, upon comparison, the district court erred in holding that this case came within the *Henry* footnote. The instant case cannot be held to be equivalent to one where an informant merely sits back and makes no effort to stimulate conversations with the suspect about the crime charged. *Henry*, 447 U.S. at 271 n.9. In fact, we conclude that *Henry* is indistinguishable from the present case. *See Henry*, 447 U.S. at 281 (Blackmun, J., dissenting) (citing *Wilson*); *Henry v. United States*, 590 F.2d 544, 553 (4th Cir. 1978) (Russell, J., dissenting) ("Certainly, there can be no distinction drawn between this case and *Wilson*. In fact, if anything, the facts in that case

were more favorable to the defendant's claim than are the facts in this case."); *Wilson v. Henderson*, 590 F.2d 408, 409 (2d Cir. 1979) (Oakes, J., dissenting) (noting *Henry* decision in Fourth Circuit to be "directly contrary" to our case); *see also United States v. Sampol*, 636 F.2d 621, 637-38 (D.C. Cir. 1980) (noting allegations that the circumstances of *Wilson* and *Henry* were "virtually identical"). Since the government intentionally staged the scene that induced Wilson to make the inculpatory statements, it may be held to have deliberately elicited them in violation of Wilson's Sixth Amendment right to counsel.

IV

Judicial decisions ordinarily apply retroactively. *Robinson v. Neil*, 409 U.S. 505, 507-08 (1973). Before *Linkletter v. Walker*, 381 U.S. 618 (1965), the Supreme Court had recognized a general rule of retroactive effect for its constitutional decisions based largely upon Blackstone's notion "that the duty of the court was not to 'pronounce a new law, but to maintain and expound the old one.' " *Id.* at 622-23 (quoting 1 W. Blackstone, Commentaries 69 (15th ed. 1809)). Consequently, a legal system based on precedent had a built-in presumption of retroactivity. Yet, in *Linkletter*, the Court refused to give that effect to *Mapp v. Ohio*, 367 U.S. 643 (1961). Instead, the Supreme Court applied its holding in *Mapp* only to those defendants whose convictions were not then final. It wrote that "the Constitution neither prohibits nor requires retrospective effect" be given to any "new" constitutional rule, *Linkletter v. Walker, supra*, 381 U.S. at 629, 628, and it recognized that the interests of justice and the exigencies of the situation may argue against imposing a "new" constitutional decision retroactively. *See id.* at 628.

On the other hand, when a Supreme Court decision does *not* espouse a "new" rule but simply applies settled precedents to new and different fact situations, no real question arises as to whether the later decision should apply retroactively. *United States v. Johnson*, 457 U.S. 537, 549 (1982). In these cases "it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way." *Id.* (citing *Dunaway v. New York*, 442 U.S. 200, 206 (1979) (reviewing application of the rule in *Brown v. Illinois*, 422 U.S. 590 (1975)); *Spinelli v. United States*, 393 U.S. 410, 412 (1969) ("further explicat[ing]" the principles of *Aguilar v. Texas*, 378 U.S. 108 (1964)); *Desist v. United States*, 394 U.S. 244, 263 (1969) (Harlan, J., dissenting)).

In determining whether *Henry* established a "new" rule of law or merely applied settled precedent to a new factual situation, we first take cognizance of the very words used by the *Henry* court in framing the issue for decision:

> The question here is whether under the facts of this case a Government agent "deliberately elicited" incriminating statements from Henry within the meaning of *Massiah*.

Henry, 447 U.S. at 270. Certainly the above quoted language does not purport to do anything more than apply the *Massiah* test for deliberate elicitation to the *Henry* facts. The *Henry* opinion reaffirmed the application of the "deliberately elicited" test by pointing out that when an accused is in the company of a fellow inmate who, by prearrangement, acts as a government agent, the conversations can serve to elicit information that an accused would not otherwise intentionally reveal

to persons *known* to be government agents. *See id.* at 273. In rejecting the government's argument that a less rigorous standard should apply where the accused is prompted by an undisclosed undercover informant rather than by a known government agent, the Court again pointed directly to *Massiah* which stated "that if the Sixth Amendment 'is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted [overtly] in the jailhouse.' " *Id.* at 273 (quoting *Massiah v. United States*, *supra*, 377 U.S. at 206). Both the *Henry* and the *Massiah* courts noted that defendants were more seriously imposed upon when they did *not* know that the informant was a government agent. *Henry*, 447 U.S. at 273; *Massiah v. United States*, *supra*, 377 U.S. at 206.

The *Henry* court continued stating that "[b]y intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel." *Henry*, 447 U.S. at 274 (footnote omitted). While the import of this statement has been questioned, *see, e.g., United States v. Bagley*, 641 F.2d 1235, 1238 n.3 (9th Cir. 1981) ("The extent to which *Henry* has modified *Massiah*, if at all, is not entirely clear"), we believe that *Henry* merely applied the "deliberately elicited" test of *Massiah* to new facts, and we reject a reading of *Henry* as establishing a "likely to induce" test that fundamentally restructures *Massiah*.[3]

Further support for the conclusion that *Henry* did not establish a "new" constitutional rule is found from the

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[3] Having so concluded, we need not address the *Linkletter/Stovall* factors governing the retroactive application of a "new" constitutional decision. *See Linkletter v. Walker*, 381 U.S. 618, 636 (1965) and *Stovall v. Denno*, 388 U.S. 293, 297 (1967).

fact that there has been no explanatory statement by the Supreme Court whether and to what extent such a purported new rule applies to past, pending and future cases. *See, e.g., Solem v. Stumes*, 104 S. Ct. 1338 (1984) (holding that *Edwards v. Arizona*, 451 U.S. 477 (1981) should not be applied retroactively); *United States v. Johnson, supra*, 457 U.S. at 542 (holding that *Payton v. New York*, 445 U.S. 573 (1980), applied retroactively to all convictions not yet final); *Williams v. United States*, 401 U.S. 646 (1971) (holding *Chimel v. California*, 395 U.S. 752 (1969) not to be retroactive); *Desist v. United States*, 394 U.S. 244, 248 (1969) ("However clearly our holding in *Katz* [*v. United States*, 389 U.S. 347 (1967)] may have been foreshadowed, it was a clear break with the past, and we are thus compelled to decide whether its application should be limited to the future."). *See generally* Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 Va. L. Rev. 1557 (1975). More specifically, for our purposes, the habeas petitioner was granted relief in *Henry* without reference to the three part test of *Stovall v. Denno*, 388 U.S. 293, 297 (1967). Since the *Stovall* analysis is employed as a matter of course to determine whether a new rule should be retroactive, the failure to discuss the *Stovall* test indicates that the Supreme Court in *Henry* did not intend to create a "new" rule, but was merely applying the *Massiah* rule to new facts.

Having decided that the principles of *Henry* are fully applicable to the instant case, we hasten to point out that the courts considering this matter earlier did not have the benefit of the *Henry* decision as we now do. Without it, the prior panel relying on *Brewer v. Williams*, 430 U.S. 387 (1977), concluded that the "deliberate elicitation" standard required evidence of "interrogation" as a pre-

requisite. Since the state trial judge found that there had been no "interrogation" of Wilson by his cellmate, the panel concluded that this negated the proposition that Wilson's statements were "deliberately elicit[ed]." *Wilson v. Henderson, supra*, 584 F.2d at 1190-91; *but see id.* at 1195 (Oakes, J. dissenting) (in finding a *Massiah* violation, "what is critical is whether police conduct 'deliberately elicited' information, not the precise manner in which the statements were obtained."). In *Henry* the Supreme Court rejected such a proposition, writing that *Brewer* never modified *Massiah's* "deliberately elicited" test. It specifically noted that "[i]n *Massiah*, no inquiry was made as to whether Massiah or his codefendant first raised the subject of the crime under investigation," *Henry*, 447 U.S. at 271-72, and went on to state that "[i]n both *Massiah* and this case, the informant was charged with the task of obtaining information from an accused." *id.* at 272 n.10. It concluded by observing that "[w]hether Massiah's codefendant questioned Massiah about the crime or merely engaged in general conversation about it was a matter of no concern to the *Massiah* Court," and deemed "irrelevant" the fact that in *Massiah* the agent had to arrange the meeting while in *Henry* the agents were fortunate to have an undercover informant already in close proximity to the defendant. *Id.*

The earlier panel also found no distinction between incriminating statements voluntarily made by a defendant to a known government officer and statements made to an undercover agent acting surreptitiously, likening the latter situation to a knowing assumption of the risk by the defendant that his confidant would ultimately prove untrustworthy. *Wilson v. Henderson, supra*, 584 F.2d at 1191. Looking again to *Massiah*, *Henry* substantially distinguished these two situations. Where an accused

speaks to a known government agent, he would typically be aware that his statements could be used against him, and as a result, the two parties could be termed " 'arm's-length' adversaries." *Henry*, 447 U.S. at 273. The same could not be said where the accused was in the company of a fellow inmate who quite unknown to the accused was acting as a police agent. In that situation, where the accused's guard was down, he might well confide in the informer who was subtly interrogating him. In that case, the concept of a knowing and voluntary waiver of Sixth Amendment rights is inapplicable. *Id.* (citing *Massiah v. United States*, *supra*, 377 U.S. at 206).

V

The State's use of a jailhouse informant to elicit inculpatory information from Wilson controvened his right to counsel under circumstances similar to those condemned in *Henry* and *Massiah*. Accordingly, the decision of the district court denying Wilson's application for habeas relief is reversed, and this case is remanded with instructions to grant Wilson's application and to direct his release unless the State elects to retry him.

VAN GRAAFEILAND, *Circuit Judge*, dissenting:

On July 4, 1970, at approximately 3:30 a.m., two witnesses saw appellant leave the Star Maintenance Cab garage in the Bronx with a quantity of money cradled in his arms. "Keep cool", appellant said as he fled the garage, "I've left something on the floor for you."

That "something" was the body of Samuel Reiner, the night dispatcher, who had been shot and killed during the course of a robbery.

In what could only be termed an understatement, my colleagues say that proof of appellant's guilt was "nearly overwhelming." The fact is that the police had appellant dead to rights. Although appellant neither confessed nor testified, he admitted to the police that he was at the scene of the crime with two other men and that he ran away with them as they fled the scene with money in their hands.

What the police did not know but wanted to learn was the identity of the other two participants in the crime. It is undisputed that Detective Cullen enlisted the aid of Benny Lee for this sole purpose. Detective Cullen told Lee that he knew appellant was one of the perpetrators. According to Lee, Cullen "didn't want me to ask questions or question the man in any way, just to sit there and to listen to him and to see if I could find out the names of the other two men who were involved." Despite this evidence which is uncontradicted, my colleagues now find that Lee was placed in appellant's cell "to elicit inculpatory information", that Lee was "subtly interrogating" appellant, and that the government "deliberately elicited the inculpatory statements" which appellant made. As in *Sumner v. Mata*, 449 U.S. 539, 548-49 (1981), these findings are contrary to those of every court that heretofore has considered this case.

Following a *Huntley* hearing, the State court found that Lee followed the instructions given him by Detective Cullen and conducted no interrogation of appellant during the time they were cellmates. The court also found "beyond a reasonable doubt that the utterances made by defendant to Lee were unsolicited, and voluntarily

made." Appellant's challenge to these findings was rejected without opinion by the Appellate Division, First Department. 41 A.D.2d 903 (1st Dep't 1973).

In denying appellant's first petition for habeas corpus, District Judge Robert Carter stated:

> The record indicates that there was no interrogation whatsoever by the undercover agent only spontaneous statements offered by petitioner.

District Judge William Mehrtens, sitting by designation on this Court and writing the majority opinion for affirmance, 584 F.2d 1185 (1978), stated that

> Lee did not make any effort to interrogate Wilson, nor was he placed in the cell for that purpose. . . .
>
> Thus, the purpose of the investigation, *i.e.*, furtively attempting to uncover the identity of the other two perpetrators, cannot be censured.

Id. at 1191.

Finally, District Judge Lee Gagliardi, whose decision is being reversed, found that the "record plainly establishes that petitioner's incriminating statements were spontaneous and were not elicited in any way by the government informant." Judge Gagliardi also found that the State court findings were "fully supported by the record."

Although in reviewing Judge Gagliardi's findings this Court is not bound by the clearly erroneous standard of review, *Taylor v. Lombard*, 606 F.2d 371, 372 (2d Cir. 1979), *cert. denied*, 445 U.S. 946 (1980), the burden nonetheless remains on appellant to establish by convincing evidence that the State court's factual determinations following the *Huntley* hearing were erroneous, *United States ex rel Stambridge v. Zelker*, 514 F.2d 45, 51 (2d

Cir.), *cert. denied*, 423 U.S. 872 (1975). We cannot dispense with the presumption that the State court's factual findings are correct, 28 U.S.C. § 2254(d), without an adequate explanation as to why the findings are not fairly supported by the record. *Sumner v. Mata*, *supra*, 449 U.S. at 548-52.

Because this Court, in affirming the rejection of appellant's prior habeas corpus application in which he advanced the same arguments that he asserts herein, made findings fully in accord with those of the State court, the need for such an explanation is even more imperative. A boilerplate statement that the "ends of justice" justify reconsideration on the merits, *see Sanders v. United States*, 373 U.S. 1, 12 (1963), does not warrant rejection of all that has gone on before. *See Sperling v. United States*, 692 F.2d 223, 225-26 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 311 (1983); *Alessi v. United States*, 653 F.2d 66, 68-69 (2d Cir. 1981). My colleagues concede that proof of appellant's guilt was "nearly overwhelming", and they point to no change in the law which has transformed conduct that we formerly held to be constitutional into conduct that is now unconstitutional. *See Sperling v. United States*, *supra*, 692 F.2d at 226. The judges who voted against en banc review of our prior order of affirmance, 590 F.2d 408, were fully familiar with the Fourth Circuit's opinion in *Henry v. United States*, 590 F.2d 544 (4th Cir. 1978), which subsequently was affirmed by the Supreme Court, 447 U.S. 264 (1980). The majority opinion does not disclose why, absent a change in the law, the "ends of justice" require reversal on this appeal when they did not require it on the prior appeal.

In short, because my colleagues have failed to demonstrate that the many judges who previously have rejected

appellant's contentions erred in so doing, and have relied solely on a talismanic reference to the "ends of justice" in getting around both the provisions of section 2254(d) and the limitations on repetitive habeas corpus applications laid down in *Sperling v. United States*, *supra*, and *Alessi v. United States*, *supra*, I dissent.

APPENDIX B

—CORRECTED—

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 17th day of December one thousand nine hundred and eighty-four.

No. 83-2113

JOSEPH ALLAN WILSON,

Plaintiff-Appellant,

v.

HON. ROBERT J. HENDERSON,

Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by defendant-appellee, Hon. Robert J. Henderson,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
Elaine B. Goldsmith
Clerk

APPENDIX C

Memorandum Decision

UNITED STATES DISTRICT COURT

Southern District of New York

82 Civ. 4397

Joseph Allan Wilson,

Petitioner,

against

Hon. Robert J. Henderson, Superintendent, Auburn Correctional Facility,

Respondent.

Gagliardi, D.J.

Joseph Allan Wilson, currently incarcerated in the Auburn Correctional Facility, has petitioned the court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In the alternative, petitioner seeks an order pursuant to Rule 60(b)(6), Fed. R. Civ. P., vacating an order of Judge Carter of this court which denied a prior petition for a writ of habeas corpus filed by petitioner.

Petitioner was convicted of murder in the second degree and possession of a weapon as a felony after a jury trial in New York Supreme Court, Bronx County, and on May 18, 1972, was sentenced to an indeterminate term of twenty

years to life on the murder count and to a concurrent indeterminate term not to exceed seven years on the weapons conviction. The convictions were affirmed without opinion by the Appellate Division, First Department, on April 19, 1973, and leave to appeal to the Court of Appeals was subsequently denied. Petitioner then filed a petition for a writ of habeas corpus before Judge Carter which was denied by opinion and order dated January 7, 1977. Judge Carter's decision was affirmed on appeal, *Wilson* v. *Henderson*, 584 F.2d 1185 (2d Cir. 1978), and petitioner's application for a rehearing en banc was denied, 590 F.2d 408 (2d Cir. 1979). The Supreme Court denied certiorari on June 18, 1979. 442 U.S. 945 (1979). Petitioner now attacks the judgment of conviction on the ground that the trial court's admission into evidence of certain post-arraignment statements by petitioner violated his Sixth Amendment right to counsel under the Supreme Court's decision in *United States* v. *Henry*, 447 U.S. 264 (1980).[1] In adjudicating petitioner's prior habeas petition before *Henry* was decided, the Second Circuit squarely rejected petitioner's Sixth Amendment claim. *Wilson, supra*, 584 F.2d at 1189-91. Petitioner now asserts that the Second Circuit's decision is inconsistent with *Henry*, and that *Henry* should be applied retroactively to this case.

1. Petitioner advanced this argument to the State Supreme Court in a motion to vacate the judgment filed on September 11, 1981 pursuant to N.Y. Crim. Proc. Law § 440.10. The motion was denied by order dated November 20, 1981, and leave to appeal to the Appellate Division was denied on January 19, 1982. Petitioner therefore exhausted his state court remedies with regard to his current claim as required by 28 U.S.C. § 2254(b). *See Klein* v. *Harris*, 667 F.2d 274, 282-84 (2d Cir. 1981).

Background

On July 14, 1970, three individuals robbed the Star Taxicab Garage and in the course of that robbery shot to death Sam Reiner, the dispatcher then on duty. Three Star employees identified petitioner as having been on the premises before the crime. Four days later, petitioner voluntarily surrendered to the authorities and was promptly arrested. After receiving *Miranda* warnings, petitioner told Detective Cullen of the New York City Police Department that he had been at the scene while looking for his brother and had witnessed the crime, but that he had not been personally involved. Petitioner told Cullen that he fled the scene because he was afraid of being blamed for the crime.

Wilson was sent to the Bronx House of Detention following his arrest. After four days, he was moved to a cell which overlooked the Star Taxicab Garage. His cellmate was a prisoner named Benny Lee who had previously agreed to act as an informant for the police. Detective Cullen had instructed Lee not to make inquiries or to question petitioner in any way, but simply to listen for information regarding the identity of the other perpetrators of the crime.

On the day that he was moved into the cell with Lee, petitioner became upset by the view of the Star Taxicab Garage from the cell window and began speaking to Lee about the robbery and murder. At that time, petitioner told Lee essentially the same story he had told Detective Cullen. Lee responded that the story "didn't sound too good."

Two or three days later, petitioner was visited by his brother, who told him that his family was saying that he had killed Sam Reiner. Petitioner became very upset by

this visit and began once again to talk about the crime. This time he told Lee that he had planned and executed the robbery and murder along with two other men.

Petitioner was subsequently indicted and charged with common law murder and possession of a weapon as a felony. He moved prior to trial to suppress his statements to Lee. The motion was denied by the state trial judge following a hearing held pursuant to *People* v. *Huntley,* 15 N.Y.2d 72, 255 N.Y.S.2d 838 (1965), and the statements were admitted into evidence at trial.

Discussion

There are two issues raised by the instant petition: (1) whether the Second Circuit's prior decision rejecting petitioner's Sixth Amendment claim is inconsistent with *United States* v. *Henry,* 447 U.S. 264 (1980); and (2) whether *Henry* should be applied retroactively. The court first turns to the merits of the Sixth Amendment claim in light of the Supreme Court't analysis in *Henry.*

The defendant in *Henry* was indicted for armed robbery and was held pending trial in the local city jail. Agents investigating the robbery thereafter contacted an inmate at the jail named Nichols who was housed in the same cell block as Henry and who had previously worked as a paid government informant. Nichols was instructed neither to question Henry nor to initiate conversations with him about the robbery, but simply to pay attention to information furnished by Henry if Henry initiated a conversation. Henry subsequently made inculpatory statements in conversations with Nichols which were used against Henry at trial.

The Supreme Court reversed the conviction, holding that the admission of the statements violated the defendant's Sixth Amendment right to counsel. The Court stated that the issue in the case was whether the inculpatory statements had been "deliberately elicted" by the government within the meaning of the Court's prior decision in *Massiah* v. *United States,* 377 U.S. 201, 206 (1964).[2] Among the relevant factors relied upon by the Court was an inference drawn from the record that Nichols "deliberately used his position to secure incriminatory information from Henry," and that the government must have known that the circumstances it had created "likely would lead to that result." *Id.* at 270-71. These facts led the Court to conclude that the government had intentionally created a situation that was "likely to induce Henry to make incriminating statements without the assistance of counsel" in violation of the Sixth Amendment. *Id.* at 274.

The court finds that *Henry* does not undermine the prior decision of the Second Circuit which rejected petitioner's Sixth Amendment claim.[3] It is true that here, as in *Henry,* the cellmate of the accused was surreptitiously acting as a government agent and that petitioner made the incriminating statements after his Sixth Amendment rights had attached.[4] However, unlike the record in *Henry,* the record in the instant case does not support the inference that the

2. In *Massiah,* the defendant, after having been indicted and released on bail, made incriminating statements to a codefendant who was acting as a government agent. The Court held that the use at trial of such statements, "which federal agents had deliberately elicited from [the defendant] after he had been indicted and in the absence of counsel" violated the Sixth Amendment. 377 U.S. at 206.

3. In light of this conclusion, the court need not and does not reach the issue of whether *Henry* should be retroactively applicable.

4. The Sixth Amendment right to counsel attaches at the time that adversary judicial proceedings are initiated against the accused. *Estelle* v. *Smith,* 451 U.S. 454, 469-70 (1981). Although petitioner's statements were made prior to his indictment, they were made after he was arraigned and therefore after his Sixth Amendment right to counsel had attached. *Id.*

government informant affirmatively secured the incriminating information from the accused. In fact, the instant record plainly establishes that petitioner's incriminating statements were spontaneous and were not elicited in any way by the government informant. The testimony at the *Huntley* hearing established that petitioner's initial false exculpatory statements to Lee were a spontaneous response to petitioner's view of the Star Taxicab Garage from his cell window, and that petitioner's ultimate confession to Lee was a spontaneous response to a disturbing visit petitioner received from his brother. This testimony led the state trial judge to find, in denying petitioner's motion to suppress, that Lee at no time asked petitioner any questions with respect to the crime, and that all of petitioner's statements in Lee's presence were "spontaneous." These state court findings, which are fully supported by the record, must be presumed to be correct by this court under 28 U.S.C. § 2254(d).

The absence of any affirmative effort on the part of Lee to elicit information from petitioner is fatal to petitioner's Sixth Amendment claim under *Henry*. The *Henry* Court expressly reserved decision on the situation squarely presented by this case, *i.e.*, "where an informant is placed in close proximity but makes no effort to stimulate conversations about the crime charged." *Henry*, 447 U.S. at 271 n.9. Of course, a claim squarely rejected in a prior Second Circuit decision cannot be reassessed by this Court on the basis of a subsequent Supreme Court case which explicitly failed to reach the issue now presented.

Furthermore, the court agrees with Justice Powell that:

> *Massiah* does not prohibit the introduction of spontaneous statements that are not elicited by governmental action. Thus, the Sixth Amendment is not violated when a passive listening device collects, but does not induce, incriminating comments. *See United States* v. *Hearst*, 563 F.2d 1331, 1347-1348 (CA9 1977), *cert. denied*, 435 U.S. 1000 (1978). Similarly, the mere presence of a jailhouse informant who had been instructed to overhear conversations and to engage a criminal defendant in some conversations would not necessarily be unconstitutional. In such a case, the question would be whether the informant's actions constituted deliberate and "surreptitious interrogatio[n]" of the defendant. If they did not, then there would be no interference with the relationship between client and counsel.

Henry, supra, 447 U.S. at 276 (Powell, J., concurring). Since the record plainly establishes that Lee's actions did not constitute surreptitious interrogation of petitioner, the admission into evidence of petitioner's incriminating statements did not abridge his Sixth Amendment right to counsel.[5]

Conclusion

For the reasons set forth above, the petition is dismissed. The motion to vacate the prior order denying petitioner's original habeas petition is denied.

So Ordered.

/s/ Lee P. Gagliardi
U.S.D.J.

Dated: New York, New York
March 30, 1983.

5. In support of his claim under *Henry*, petitioner relies in part on the placement of petitioner in the cell overlooking the scene of the crime, claiming that this action deliberately elicited his statements in violation of the Sixth Amendment. Although the record indicates that petitioner's placement in the cell motivated his initial exculpatory statements to Lee, there is no doubt that the location of the cell, without more, was not "likely to induce [petitioner] to make incriminating statements" in violation of the Sixth Amendment. *Henry, supra* 447 U.S. at 277.

APPENDIX D

Opinion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Civ. 5186

UNITED STATES OF AMERICA ex rel. JOSEPH ALLEN WILSON,
Plaintiff,

against

HON. ROBERT J. HENERSON, Superintendent,
Auburn Correctional Facility,
Defendant.

APPEARANCES:

Joseph Allen Wilson, Pro Se, 135 State Street, Auburn, New York 13022.

Hon. Louis J. Lefkowitz, Attorney General of the State of New York, Two Trade Center, New York, New York 10047.

by: Arlene R. Silverman, Assistant Attorney General
Attorneys for Defendant.

OPINION

CARTER, District Judge

Petitioner, Joseph Allen Wilson, an inmate at Auburn Correctional Facility, seeks a writ of habeas corpus. On April 20, 1972, petitioner was convicted in a jury trial in

New York State Supreme Court of murder and possession of a weapon. On May 18, 1972, petitioner was sentenced to a prison term of twenty years to life on the murder conviction, and to a concurrent term, not to exceed seven years, on the weapons conviction.

Petitioner has exhausted his state remedies. On April 23, 1973, the Appellate Division affirmed Wilson's conviction. Leave to appeal to the New York Court of Appeals was denied.

Facts

Joseph Allen Wilson planned the robbery of the Star Taxicab Garage. As a former employee, he knew its layout and was familiar with its business operations. In the early morning hours of July 4, 1970, Wilson was joined by two companions to execute his robbery plan. The three proceeded to the dispatcher's office where Sam Reiner was on duty. Apparently, Reiner refused to cooperate and was shot twice. He died instantly; and the three escaped.

Four days later, Wilson turned himself in to the authorities. When advised of his rights by Detective Walter Cullen, Wilson said he understood. He was asked if he wanted to make a statement and he replied, "No." He was then asked if he wanted to explain what he was doing on July 4th. Wilson replied, "Yes", and revealed to Detective Cullen that he had been at the scene and had witnessed the crime, although he insisted he was not personally involved.

Wilson was placed in a cell with Benny Lee who had earlier agreed with the police to act as an informant. Lee was instructed not to inquire or question Wilson, but to keep his ears open.[1] While Wilson initially kept to the

1. After the *Huntley* hearing, the court determined that Lee "so acted and, accordingly, no interrogation was conducted by Lee of the defendant at the time they were cellmates." (Tr. 142)

story he told Detective Cullen, he finally confessed to Lee that he had planned the robbery with the other two hold-up men and that the three of them perpetrated the crime. Wilson was subsequently indicted by the grand jury and charged with common law murder and possession of a weapon as a felony. At trial, both the statements made to Lee and those made to Cullen were admitted into evidence.

Petitioner makes here the following claims: (1) he was deprived of a speedy trial; (2) he was denied his right against self-incrimination when the arresting officer questioned him in custody; (3) the assignment of an undercover agent as his cellmate violated petitioner's constitutional rights; and (4) denial by the New York State Supreme Court of his discovery motion made it impossible for him to prepare his defense adequately.

For reasons stated below, petitioner's request for a writ of habeas corpus is denied.

* * *

Assignment of Undercover Agent as Petitioner's Cellmate

Petitioner asserts that the assignment of an undercover agent as his cellmate violated his constitutional rights.

The Supreme Court has held that the Sixth Amendment guarantees the aid of counsel during police interrogations in extra-judicial proceedings, *Massiah* v. *United States, supra,* 377 U.S. at 204; *Spano* v. *New York, supra,* 360 U.S. at 326 (Douglas, J. concurring). This right attaches "after the onset of formal prosecutorial proceedings," *Kirby* v. *Illinois,* 406 U.S. 682, 690 (1972). The record indicates that there was no interrogation whatsoever by the undercover agent only spontaneous statements offered by petitioner.[2]

2. See footnote 1, *supra.*

This fact precludes any Sixth Amendment violation. Since *Miranda* warnings need be given only when there is police custodial interrogation, *see United States* v. *Mattson,* 469 F.2d 1234, 1237 (9th Cir. 1972), *cert. denied,* 410 U.S. 986 (1973); *United States* v. *Godfrey,* 409 F.2d 1338, 1339 (10th Cir. 1969); and *Parson* v. *United States,* 387 F.2d 944, 945-46, this fact also precludes any Fifth Amendment violation.

Whatever claim petitioner might have that the use of the government agent violated his right to be protected against illegal searches and seizures, it is clear he had no expectation of privacy in the information divulged to the agent. The Supreme Court has stated that:

> "[n]either this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it."

Hoffa v. *United States, supra,* 385 U.S. at 302.

Finally, it cannot be concluded that due process was violated in this case. In *Hoffa* v. *United States, supra,* 385 U.S. at 311, the Court rejected such a claim when it stated that "the use of secret informers is not *per se* unconstitutional."

* * *

Petition denied.

IT IS SO ORDERED.

Dated: New York, New York
January 7, 1977

/s/ ROBERT L. CARTER

ROBERT L. CARTER
U.S.D.J.

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 832—September Term, 1977.

(Argued May 23, 1978 Decided September 20, 1978.)

Docket No. 78-2015

JOSEPH ALLEN WILSON,

Petitioner-Appellant,

—against—

HON. ROBERT J. HENDERSON, Superintendent,
Auburn Correctional Facility,

Respondent-Appellee.

Before:

OAKES, *Circuit Judge,*

BLUMENFELD* and MEHRTENS,** *District Judges.*

Appeal from denial of petition for writ of habeas corpus attacking judgment of conviction on charges of murder and possession of weapon.

* Hon. M. Joseph Blumenfeld, Senior United States District Judge for the District of Connecticut, sitting by designation.

** Hon. William O. Mehrtens, Senior United States District Judge for the Southern District of Florida, sitting by designation.

Affirmed.

JEFFREY IRA ZUCKERMAN, New York, N.Y., *for Petitioner-Appellant.*

LOUIS J. LEFKOWITZ, Attorney General of the State of New York and SAMUEL A. HIRSHOWITZ, First Assistant Attorney General, New York, N.Y. (Arlene R. Silverman, Assistant Attorney General, on the brief), *for Respondent-Appellee.*

MEHRTENS, *District Judge*:

In the early morning of July 4, 1970, three assailants robbed the Star Taxicab Garage and murdered the dispatcher on duty. Three Star employees identified the petitioner, Joseph Allen Wilson, as having been on the premises before the crime. Two testified that they had seen Wilson, a former employee, running from the scene after the incident, cradling money in his arms.

Four days later Wilson voluntarily surrendered himself to the authorities. He was promptly arrested and advised of his constitutional rights by Detective Walter Cullen. Wilson acknowledge seriatim that he understood each of his rights. At the conclusion of the recitation of rights, Cullen asked Wilson if, understanding all of his rights, he wished to make a "statement." Wilson replied, "No." The officer then queried, "Well, would you care to tell me what you did on July 4th?" Wilson responded affirmatively and revealed to Detective Cullen that he had been at the scene and had witnessed the crime, but insisted that he had not been personally involved. Wilson claimed to have fled the premises for fear of being blamed.

Wilson concluded his narrative with the words, "And that's all." Cullen asked Wilson if he would care to tell

him where he was between July 4th and the 8th. Wilson emphatically replied, "No, that's all I have to say." At that point the questioning ceased, and Wilson was removed to a detention cell. Counsel was subsequently assigned to represent him.

Wilson's cellmate, Benny Lee, had previously agreed to act as an informant for Detective Cullen. Lee was specifically instructed not to inquire or question, but to keep his ears open for information which could lead to the apprehension of Wilson's accomplices.

Initially, Wilson repeated to Lee the same version of the facts that he had related to Cullen. Lee's only comment was that the story did not sound too good. By the end of the third day, Wilson made an auricular confession to complicity in the robbery and murder.

Wilson was indicted and charged with common law murder and possession of a weapon as a felony. Prior to trial, Wilson moved to suppress his statements to Cullen and Lee. In accordance with *People* v. *Huntley,* 15 N.Y. 2d 72, 204 N.E. 2d 179, 255 N.Y.S. 2d 838 (1965), the state trial judge held a pre-trial hearing on the issue of the admissibility of the inculpatory statements made by Wilson. The court ruled adversely to Wilson, and the statements were admitted at trial. The jury returned a verdict of guilty on both counts, and Wilson was sentenced to a term of from twenty years to life on the murder conviction and to a concurrent term not to exceed seven years on the weapons count. The conviction was affirmed by the state appellate court and leave to appeal to the New York Court of Appeals was denied.

The instant appeal is taken from the district court's order denying Wilson's petition for a writ of habeas corpus.

Wilson cites as error the admission at trial of his statements to Cullen and Lee, and also challenges his conviction on the grounds that he was denied a speedy trial and that the denial of his discovery motion made it impossible for him to adequately prepare his defense.

* * *

II

Wilson's next assertion is that his incriminating statement made to his cellmate, Benny Lee, was improperly admitted at trial in violation of his Sixth Amendment right to counsel under *Massiah* v. *United States,* 377 U.S. 201 (1964).

The petitioner in *Massiah,* following his indictment for violation of federal narcotics laws, retained a lawyer, pleaded not guilty and was released on bail. A federal agent succeeded by surreptitious means in listening to incriminating statements elicited from the petitioner while he was free on bail. The statements were introduced against the petitioner at trial, and he was convicted. The Supreme Court reversed, holding that

> the petitioner was denied the basic protections of [the right to counsel] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of counsel.
>
> 377 U.S. at 206.

In the aftermath of *Massiah* some doubt remained as to whether all post-indictment statements made without the presence of counsel would be inadmissible, or whether such statements would be tainted only when police made a de-

liberate, pre-meditated effort to elicit incriminating remarks from a defendant. The Third Circuit, relying on the Supreme Court's per curiam reversal of *State* v. *McLeod,* 381 U.S. 356 (1965), concluded that *Massiah* rendered inadmissible all post-indictment statements obtained without counsel regardless of the circumstances. *United States ex. rel. O'Connor* v. *New Jersey,* 405 F.2d 632 (3rd Cir. 1969) cert. denied, *Yeager* v. *O'Connor,* 395 U.S. 923 (1969).

This circuit, however, has plainly adopted the majority view which requires that there be some circumstance more than the mere absence of counsel before a defendant's post-indictment statement is rendered inadmissible. In *United States* v. *Garcia,* 377 F. 2d 321 (2nd Cir. 1967) cert. denied 389 U.S. 991 (1967), this court refused to extend Sixth Amendment protection to a voluntary, incriminating statement made by the defendant to a federal officer where the officer was completely unaware of the existence of an indictment and was not seeking information about the crime charged in the indictment. In affirming the conviction this court said:

> Massiah was thus not aimed at all post-indictment evidence gathered by the prosecution, but at the narrow situation where, after indictment, law enforcement authorities have "deliberately elicited" incriminating statements from a defendant by direct interrogation or by surreptitious means. The rule does not apply to spontaneous or voluntary statements made by the defendant in the presence of a government agent.
>
> 377 F. 2d at 324 (footnote deleted).

The recent Supreme Court case of *Brewer* v. *Williams, supra,* strengthened this circuit's restrictive interpretation of *Massiah.* In *Brewer,* the Court stated that "no such

constitutional protection [of the right to assistance of counsel at the time the defendant made the incriminatory statements] would have come into play if there had been no interrogation." 430 U.S. at 400.

The trial judge in the instant case found that there had been no interrogation whatsoever by the undercover cellmate.[1] Detective Cullen testified that Lee had been specifically directed to refrain from questioning Wilson; Lee confirmed those instructions in his testimony. The complete absence of interrogation in this case negates the proposition that Wilson's statement was deliberately elicited. According to *Brewer,* constitutional protection would not attach under these circumstances.

Absence of interrogation was also an issue in *United States* v. *Hearst,* 563 F. 2d 1331 (9th Cir. 1977) cert. denied 46 U.S.L.W. 3659 (1978), where the court rejected the argument that interrogation is not required by *Massiah.* Hearst argued that intentional, secret listening would suffice as the prohibited "deliberate elicitation" of incriminating statements. Hearst's conviction was affirmed despite her contention that the surreptitious tape recording in her cell of her self incriminating conversation with a friend violated her Sixth Amendment right to counsel. Similarly, the court in *United States* v. *Fioravanti,* 412 F. 2d 407 (3rd Cir. 1969) cert. denied 396 U.S. 837 (1969), commented that there was no violation of the Sixth Amendment where the defendant freely volunteered an incriminating statement to an undercover agent who had been deliberately arrested along with the defendant. 412 F. 2d 413 at n. 15.

The instant case, therefore, is significantly different from *Brewer,* where the Court found that the police ques-

1. This factual finding is entitled to a presumption of correctness under 28 U.S.C. § 2254.

tioned the defendant with specific intent to elicit incriminating statements. The police in *Brewer* promised counsel that the defendant would not be interrogated during his transportation to another city. The defendant, accused of murdering a young girl, was known to one officer to be a deeply religious, former mental patient. The officer sought to obtain incriminating remarks from the defendant by stating that he felt they should stop and locate the body so that the little girl might have a Christian burial. The defendant eventually made several incriminating statements and directed the police to the girl's body. The Supreme Court held that the "Christian burial" speech was tantamount to interrogation and that under *Massiah* the defendant was entitled to the assistance of counsel at the time he made the incriminating statement. The Court stated that there could be no doubt that the officer deliberately and designedly set out to elicit incriminating information.

In contrast, Lee did not make any effort to interrogate Wilson, nor was he placed in the cell for that purpose. Both Lee and Cullen testified that Lee's job was to listen for the identity of Wilson's confederates. In *Massiah,* the Supreme Court stated:

> We do not question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of a defendant and his alleged confederates, even though the defendant had already been indicted.
>
> 377 U.S. at 207.

Thus, the purpose of the investigation, *i.e.,* furtively attempting to uncover the identity of the other two perpetrators, cannot be censured. Further, where Lee did not

interrogate Wilson, nor in any way attempt to deliberately elicit incriminating remarks, the rule of *Massiah* has not been transgressed.

Nor is the fact that the informant was placed in Wilson's cell under surreptitious circumstances a distinguishing point in this case. This court has repeatedly held that a defendant's voluntary, incriminating statements made to a person known by the defendant to be a government officer are properly admissible under *Massiah. United States* v. *Garcia, supra; United States* v. *Gaynor,* 472 F. 2d 899 (2nd Cir. 1973); *United States* v. *Barone,* 467 F. 2d 247 (2nd Cir. 1972); *United States* v. *Maxwell,* 383 F. 2d 437 (2nd Cir. 1972) cert. denied 389 U.S. 1043 (1968); *United States* v. *Accardi,* 342 F. 2d 697 (2nd Cir. 1965) cert. denied 382 U.S. 954 (1965). Ostensibly, comparable statements made to undercover agents should receive similar treatment because the fact that an incriminating statement is received surreptitiously or otherwise is constitutionally irrelevant. *Brewer* v. *Williams,* 430 U.S. at 400. Furthermore, the admission of an in-custody statement voluntarily made to an informant seems less egregious than the use of a statement intercepted by an electronic eavesdropping device as was upheld in *United States* v. *Hearst, supra.* When a defendant makes a completely unsolicited, incriminating remark in a face-to-face encounter with an informant, he knowingly assumes the risk that his confidant may ultimately prove to be untrustworthy. In an illegal search and seizure case the Supreme Court stated:

> [n]either this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to

whom he voluntarily confides his wrongdoing will not reveal it.

Hoffa v. *United States,* 385 U.S. 293, 302 (1966)

Nor can such a shield be found in the Sixth Amendment.

An examination of the purposes served by the suppression of evidence further supports the decision reached below on this issue. The exclusion of reliable evidence is a remedy fashioned by the courts in order to deter impermissible police conduct and to preserve judicial integrity.

Cullen's action in this case was not the type of reprehensible police behavior which the courts feel compelled to discourage. The instructions to Lee suggest a conscious effort on Cullen's part to guard Wilson's constitutional rights while pursuing a crucial homicide investigation. His directions, "Don't ask questions; just keep your ears open," suggest familiarity and attempted compliance with, not circumvention of, the principle of *Massiah.* Under these circumstances, exclusion of Wilson's confession to Lee would serve no useful purpose. Accordingly, we are of the opinion that there was no infringement of Wilson's Sixth Amendment right to the assistance of counsel.

* * *

We concur in all respects with the decision below.

AFFIRMED.

OAKES, *Circuit Judge* (dissenting):

I respectfully dissent.

* * *

I find the *Massiah*[9] point equally persuasive. In that case, as here, a conceded police agent was used to secure incriminating statements from a represented defendant in the absence of his counsel. There is surely no difference, except one of reliability perhaps, between the radio transmitter used in *Massiah* and the planted cellmate used here. Thus, the only real distinction advanced is that Benny Lee did not "interrogate" Wilson.[10] But the Government did not "interrogate" Massiah.[11] Certainly the Court did

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9. *Massiah* v. *United States,* 377 U.S. 201 (1964).

10. True, *Brewer* v. *Williams,* 430 U.S. 387, 401 (1977), states that "the clear rule of *Massiah* is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him" (footnote omitted). But I do not think that by the use of this language *Brewer* has sub silentio limited *Massiah.* Justice Stewart's opinion in *Brewer* begins by pointing out that the Court need not rely on *Miranda* because it was "clear" that the Sixth Amendment was violated. Then the Court implicitly concedes that Williams may not have been formally interrogated in the sense proscribed by *Miranda:* "Detective Leaming deliberately and designedly set out to elicit information from Williams just as surely as—and perhaps more effectively than—if he had formally interrogated him." 430 U.S. at 399.

The Court then points out that the state courts had proceeded as if the detective's speech had been "tantamount to interrogation." Throughout the rest of the opinion, the Court must be using "interrogation" to mean *both* formal interrogation and "deliberate eliciting" (which is "tantamount" to formal). The "interrogation" language may be ill chosen, but the Court's statement that the "clear rule" of *Massiah* is that the right to counsel attaches when the State "interrogates" could not by any stretch of the imagination be interpreted as a *limitation* of *Massiah.* The next sentence, indeed, to the effect that it "requires no wooden or technical application" of *Massiah* to conclude that Williams was entitled to counsel, shows that the spirit, as well as the substance, of *Massiah* is alive and well.

11. The *Massiah* Court said:

> A few days later, and quite without the petitioner's knowledge, Colson decided to cooperate with the government agents in their continuing investigation of the narcotics activities in which the petitioner, Colson, and others had allegedly been engaged. Colson

(footnote continued on next page)

not rely on the fact that Massiah was interrogated.[12] Rather, what is critical is whether police conduct "deliberately elicited" information, not the precise manner in which the statements were obtained:

> We hold that the petitioner was denied the basic protections of that guarantee when there was used against him at his trial evidence of his own incrimianting words, which federal agents had deliberately elicited

permitted an agent named Murphy to install a Schmidt radio transmitter under the front seat of Colson's automobile, by means of which Murphy, equipped with an appropriate receiving device, could overhear from some distance away conversations carried on in Colson's car.

On the evening of November 19, 1959, Colson and the petitioner held a lengthy conversation while sitting in Colson's automobile, parked on a New York street. By prearrangement with Colson, and totally unbeknown to the petitioner, the agent Murphy sat in a car parked out of sight down the street and listened over the radio to the entire conversation. The petitioner made several incriminating statements during the course of this conversation. At the petitioner's trial these incriminating statements were brought before the jury through Murphy's testimony, despite the insistent objection of defense counsel. The jury convicted the petitioner of several related narcotics offenses, and the convictions were affirmed by the Court of Appeals.

377 U.S. at 202-03 (footnote omitted).

12. The cases cited by the majority are distinguishable. In *United States* v. *Garcia*, 377 F.2d 321 (2d Cir.), *cert. denied*, 389 U.S. 991 (1967), the officer to whom the incriminating statements were made was, in the majority's own words, "unaware of the existence of an indictment and was not seeking information about the crime charged in the indictment." *United States* v. *Hearst*, 563 F.2d 1331, 1347-48 (9th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3665 (U.S. Apr. 25, 1978), also differs from this case since in *Hearst* the incriminating statements were made to Ms. Hearst's friend who was not working for the Government. Their conversation was simply recorded by government agents. The majority's reliance on *United States* v. *Fioravanti*, 412 F.2d 407 (3d Cir.), *cert. denied*, 396 U.S. 837 (1969), is also misplaced. In that case, where an informant was arrested along with the defendant who subsequently made incriminating statements to the informant, the purpose of arresting the informant was not to elicit admissions from the defendant but to protect his cover and his person. *See id.* at 413-14 n.15.

> from him after he had been indicted and in the absence of his counsel. It is true that in the *Spano* [*Spano* v. *New York*, 360 U.S. 215 (1959)] case the defendant was interrogated in a police station, while here the damaging testimony was elicited from the defendant without his knowledge while he was free on bail. But, as Judge Hays pointed out in his dissent in the Court of Appeals, "if such a rule is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse. In this case, Massiah was more seriously imposed upon . . . because he did not even know that he was under interrogation by a government agent." 307 F.2d, at 72-73.

Massiah v. *United States*, 377 U.S. 201, 206 (1964). As far as I know, *Massiah* is still the law. *See Brewer* v. *Williams*, *supra*, 430 U.S. at 400-01. *See* note 10 *supra*.

I would reverse and grant the writ unless appellant were retried.

APPENDIX F

JOSEPH ALLEN WILSON,
Petitioner-Appellant,

v.

ROBERT J. HENDERSON, Superintendent,
Auburn Correctional Facility,
Respondent-Appellee.

No. 832, Docket 78-2015.

United States Court of Appeals,
Second Circuit.

Argued May 23, 1978.

Decided Sept. 20, 1978.

On Rehearing En Banc Decided
Jan. 23, 1979.

A petition for rehearing containing a suggestion that the action [2 Cir., 584 F.2d 1185] be reheard en banc having been filed herein by counsel for the appellant, and a poll of the judges in regular active service having been taken and there being no majority in favor thereof,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Circuit Judges FEINBERG, MANSFIELD, OAKES, and GURFEIN vote to reconsider whether *Miranda* v. *Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), requires reversal of the judgment of the District Court.

Circuit Judges MANSFIELD, OAKES, and GURFEIN also vote to reconsider whether reversal is required by *Massiah* v. *United States,* 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964).

Circuit Judge OAKES has filed a dissenting opinion.

OAKES, Circuit Judge (dissenting):

I wish to have my dissent to the denial of the petition for rehearing en banc noted not to add anything to the substance of what was said in my original dissenting panel opinion but to underscore the importance of the *Miranda* and *Massiah* issues involved, an importance that is emphasized by Professor Yale Kamisar's forthcoming article, *Brewer* v. *Williams, Massiah and Miranda: What Is "Interrogation"? When Does It Matter?,* 67 Geo.L.J. 1 (1978), to be published shortly. I note also that a panel majority of the Fourth Circuit has recently held on the *Massiah* point directly contrary to the panel majority in this case. *Henry* v. *United States,* 590 F.2d 544 (4th Cir. 1978).